IN THE SUPREME COURT

Appeal from the Court of Appeals

PAUL DRESSEL
And THERESA DRESSEL,

Plaintiffs-Appellees,

V

AMERIBANK,

Defendant-Appellant.
_____/

Supreme Court Case No. 119959

Court of Appeals Case No. 222447

Kent County Circuit Court
Lower Court No. 98-013017-CP

Brief on Appeal -- Michigan Bankers Association, as *Amicus Curiae*

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STATE OF MICHIGAN

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MICHIGAN BANKERS ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

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STATEMENT OF RELIEF SOUGHT

The Michigan Bankers Association supports AmeriBank's Brief on Appeal and its request for reversal of the Court of Appeals' decision and reinstatement of the judgment of the Kent County Circuit Court dismissing the action.

QUESTIONS PRESENTED FOR REVIEW

The Michigan Bankers Association adopts the questions presented for review in AmeriBank's Brief on Appeal.

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

The Michigan Bankers Association adopts the Statement of Facts and Material Proceedings in AmeriBank's Brief on Appeal.

ARGUMENT

I. A LENDER'S FILLING IN OF BLANKS IN PREPRINTED MORTGAGE LENDING FORMS DOES NOT CONSTITUTE THE PRACTICE OF LAW, BECAUSE THAT ACTIVITY IS INCIDENTAL TO A LENDER'S BUSINESS.

The Michigan Bankers Association agrees with AmeriBank's position that a lender does not engage in the practice of law merely by filling in the blanks in standard forms that the lender is required to use on residential mortgage loans in order to sell those loans on the secondary market, because that activity is incidental to the lender's business.

The Court of Appeals agreed "that drafting mortgage documents was incidental to defendant's business." *Dressel v. AmeriBank*, 247 Mich App 133, 142; 635 NW2d 328, 333 (2001). The Court claimed, however, that AmeriBank's charging of a "document preparation fee" to each borrower caused AmeriBank's filling in of the blanks in standard loan documents to constitute the practice of law, even though doing so was incidental to AmeriBank's business. For the reasons outlined in the next argument, the Court's conclusion on this was wrong.

II. IN DETERMINING WHETHER AMERIBANK WAS PRACTICING LAW, THE COURT OF APPEALS ERRED BY APPLYING A MECHANICAL TEST THAT FOCUSED ALMOST EXCLUSIVELY ON THE CHARGING OF A DOCUMENT PREPARATION FEE AND BY IGNORING OTHER FACTORS THAT ARE FAR MORE RELEVANT.

The Court of Appeals applied a mechanical test in determining whether a lender's filling in the blanks in standard, prescribed loan forms constituted the practice of law. According to the Court of Appeals, if the lender charges the borrower a "document preparation fee," then the lender is practicing law; but if the lender does not charge such a fee, then it is not practicing law. This test, however, is far too mechanical. It ignores other critical criteria and distinctions that must be considered in determining whether someone is engaged in practicing law.

The Court of Appeals never even suggested that any of the following factors might be relevant in determining whether a lender is practicing law:

- Did the lender hold itself out to a borrower as being the borrower's attorney?
- Did the lender represent to a borrower that, in completing the blanks in the standard loan forms, it was performing a service for the borrower?
- Did the lender provide legal advice to a borrower?
- Did the borrowers believe that, in filling in the blanks in the forms, the lender was looking out for the borrowers' interests rather than the lender's interests?
- Did the lender's activities subject a borrower to "untrained legal counsel and incorrect legal advice," which the Court of Appeals acknowledged is the purpose of the prohibition against an unlicensed person's practicing law? *Dressel*, 247 Mich App 133, 138; 635 NW2d 328, 330 (2001).
- Would requiring a lender to hire attorneys to fill in the blanks in form documents (which is the result of the Court of Appeals' decision) protect borrowers from "untrained legal counsel and incorrect legal advice?"

All of these questions, of course, would be highly relevant in determining whether a lender is acting as an unlicensed attorney for its customers. But the Court of Appeals' analysis does not consider any of them. Instead, the Court of Appeals took a simplistic approach that focuses almost entirely on whether the lender makes "a separate charge" for "document preparation."

Under this approach, even if all of the foregoing questions were answered affirmatively, the lender would not be practicing law as long as it did not charge a "document preparation fee." On the other hand, if, as in this case, all of the questions are answered negatively, but the lender charged a "document preparation fee," then the lender would be "practicing law" as the borrowers' unlicensed attorney.

This "separate charge" test that the Court of Appeals applied is erroneous because it fails to recognize the crucial difference between (1) a person who prepares transaction documents for itself and passes on its costs of doing so to the other party to the transaction and (2) a person who prepares transaction documents as a service for another person and charges the other person a fee for doing so.

AmeriBank and every other business have the right to reflect in its price all of its costs of doing business -- including the cost of document preparation. Each business is entitled to, and does, add up the costs of providing a product or service (which costs may include things like employee time and computerized resources spent preparing documents) and recoup them by passing them on to the consumer. Whether a particular cost is included in the final price of the product or service or whether it is specifically itemized for the customer's benefit, the cost will be borne by the consumer.

Whenever a lender, an insurance company, a builder or a retail seller fills in the blanks in a standardized contract, the cost of its doing so is passed on to the borrower or purchaser. Take, for example, the case of an insurance company that obtains information from a potential customer over the phone in order to fill in the blanks in a computerized insurance contract form. A large insurance company may have an entire department of employees whose time is devoted solely to taking such information and preparing insurance contracts that reflect the terms that the customers provide. The cost of those employees' time is reflected in the customer's insurance premium. Under the approach taken by the Court of Appeals:

- If the insurance company includes this cost in the insurance premium it charges the customer, without separately itemizing the customer's pro rata share of the cost, then it is *not* engaged in the practice of law; but

- If the insurance company does itemize the customer's pro rata share of the costs of employees' contract preparation time, then the insurance company *is* engaged in the practice of law.

That interpretation of the unauthorized practice statutes is illogical and unsupported by the language of the statutes. It has virtually nothing to do with protecting consumers "from untrained legal counsel and incorrect legal advice."

To take another example, a furniture retailer does not have a lawyer on its premises to complete and review every retail installment sale contract that it enters into with its customers. Rather, a salesperson completes a form contract by filling in the blanks to reflect the terms of the particular transaction between the customer and the retailer. This process will require a certain amount of the salesperson's time, perhaps requiring the store to hire additional salespeople to take care of new customers while other salespeople are engaged in paperwork. The retailer does not simply absorb these costs. Instead, those costs (together with utilities, rent and other overhead costs) are reflected in the price that the customer pays for the furniture. It is unlikely that a document preparation fee would appear in the retail installment sale contract, but there is no doubt that the customer absorbed that particular cost. Yet nobody (presumably including the Court of Appeals and the Plaintiffs) would argue that the furniture retailer has engaged in the unauthorized practice of law.

The cost that AmeriBank and other members of the Michigan Bankers Association pass on to their customers for preparation of "legal documents" is no different than other costs that consumers bear for bank resources. For instance, a bank charges a loan application fee because there is a cost to the bank in reviewing a loan application. Similarly, a bank charges a document preparation fee because it costs the bank time and money to prepare the documents required for a mortgage loan to close. If the bank is not practicing law by simply preparing a legal document, then it is illogical to claim that it is doing so by passing

on the associated cost. It makes no sense whatever for the question of whether the lender is practicing law to turn on whether the fee is separately invoiced or is instead incorporated elsewhere in the price.

In this case, AmeriBank could have included the document preparation fee as part of the loan processing fee. If banks like AmeriBank and other Michigan Bankers Association members are told that they must stop charging a document preparation fee because it constitutes the unauthorized practice of law, then they will simply roll that expense into the loan processing fee, or perhaps they will increase the interest rate on such loans. Preparing loan documents costs the bank money. If the bank wants to stay in business, it will have to pass this cost on to the borrower. The cost of credit will not change just because a court says that the bank may not itemize its document preparation costs.

Furthermore, the unauthorized practice of law statutes say nothing about a separate charge. They simply say that it is unlawful for a corporation to practice law for anyone other than itself. MCL §§ 450.681 and 600.916. They do not say that filling in blank forms on standard residential mortgage loan documents is practicing law if the lender charges a "document preparation fee," but that it is not practicing law if the lender does not charge such a fee and instead passes on its document preparation costs in another form, such as a higher interest rate or loan processing fee. The reason the statutes do not say this is that such a rule would be absurd. A lender's filling in of blanks on the standardized documents that the secondary market requires it to use when it makes a mortgage loan does not constitute the practice of law, whether or not the lender charges a "document preparation fee."

III. IF AMERIBANK "PRACTICED LAW" BY COMPLETING PREPRINTED FORMS, THEN IT DID SO FOR ITSELF AND THEREFORE DID NOT ENGAGE IN THE "UNAUTHORIZED" PRACTICE OF LAW .

As outlined above, the Michigan Bankers Association disagrees with the conclusion of the Court of Appeals that AmeriBank engaged in the practice of law simply because it charged a separate fee for document preparation. Even if that conduct did constitute the practice of law, however, the Court of

Appeals needed to go one step further to determine whether that practice was authorized under the pro se exception to the unauthorized practice statute. MCL § 450.681. If it "practiced law" at all, then AmeriBank plainly "practiced law" on its own behalf. Therefore it qualifies for the pro se exception. Both the Michigan Court of Appeals and the Plaintiffs in their Brief in Opposition to Application for Leave to Appeal mischaracterized this exception.

MCL § 450.681 prohibits a corporation or voluntary association from practicing law "for any person other than itself." The right to practice law on one's own behalf has been commonly referred to as the "pro se exception" to the unauthorized practice of law statute. In addressing AmeriBank's qualification under the "pro se" exception, the Court of Appeals stated

> Defendant claims that it was acting on its own behalf when it prepared plaintiffs' mortgage and that the 'pro se exception,' in MCL 450.681 and MCL 600.916, allows individuals and companies to prepare legal documents for themselves. Thus, defendant opines that its actions were not the unauthorized practice of law because it was an interested party to the transaction. However, we believe that the separate fee for the preparation of mortgage documents by a bank crosses the threshold of providing services for the bank's own benefit and engaging in a business where a profit is made from manufacturing legal documents without the requirement of licensure from the state bar. If the preparation of the mortgage documents for defendant's customers was not a service, but rather incidental to its business as defendant claims, then there would be no basis for the separate charge to defendant's customers. Thus, the trial court erred when it concluded that the preparation of legal documents by an interested party, where a fee is charged, is not the unauthorized practice of law.

Dressel, 247 Mich App 133, 143-144; 635 NW2d 328, 333-334 (2001).

The Court of Appeals did not properly apply the pro se exception. First, it created a requirement that there be no separate charge for the preparation of the legal documents – a requirement that is nowhere to be found in MCL § 450.681. MCL § 450.681 does not say that a corporation cannot prepare legal documents for itself if it recovers its associated costs from its customer. The statute makes no mention whatever of the effect of charging a fee. Therefore, contrary to the opinion of the Court of Appeals, an entity qualifies for the pro se exception if it prepares legal documents on its own behalf, regardless of whether it recovers from its customer the costs that it has incurred in doing so.

Second, the Court of Appeals erred in concluding that AmeriBank prepared the loan documents for the benefit of its customer (and not for its own benefit) simply because it required the customer to reimburse its costs of preparing the documents. Banks routinely recover from customers their costs of obtaining credit reports, taking and processing loan applications and obtaining lenders' policies of title insurance. All of these services are performed or contracted for by the bank for its own protection and benefit, but it rightfully recovers the costs of those services from the customer whose loan generated the need for them. Likewise, the bank prepares loan documents for its own benefit and protection, and not that of the customer. Charging a fee should not be determinative of whether a bank is "practicing law," but if it is, it in no way diminishes the bank's eligibility for the pro se exception.

Third, the Court of Appeals erred because it used the test articulated in *Ingham County Bar Association v. Walter Neller Company*, 342 Mich 214; 69 NW2d 713 (1955) to determine whether AmeriBank qualified for the pro se exception under MCL § 450.681. Under the test developed by the Supreme Court in *Walter Neller*, a party does not engage in the practice of law, let alone the "unauthorized" practice of law, if it completes legal forms in connection with a transaction in which it is "interested" and does not charge a separate fee. *Id.* at 229. In that case, the defendant was a real estate broker who prepared purchase agreements and real estate transfer documents for deals that it brokered and for which it was entitled to a commission. In that sense, it was an "interested party" to the transaction. Although the real estate broker received a commission on the sale, it did not charge a separate document preparation fee. By satisfying these two criteria, the Michigan Supreme Court concluded that the real estate broker had not practiced law at all.

In this case, the Court of Appeals determined that AmeriBank was an "interested party" to the transaction who received a separate fee for the preparation of legal documents. On that basis, the Court of Appeals concluded that AmeriBank did not qualify for the pro se exception and had engaged in the unauthorized practice of law. *Dressel*, 247 Mich App 133, 143-144; 635 NW2d 328, 333-334 (2001).

Although the Court of Appeals did not specifically mention the *Walter Neller* case or *State Bar of Michigan v. Kupris*, 366 Mich 688; 116 NW2d 341 (1962) in its analysis of the pro se exception, it clearly borrowed and applied the test used in those cases to determine whether AmeriBank qualified for the exception. Similarly, Plaintiffs in their Brief in Opposition to Application for Leave to Appeal claimed that Supreme Court authority already "recognizes and defines the 'pro se' exception" in *Walter Neller* and *Kupris*. Brief in Opposition to Application for Leave to Appeal, page 11. Plaintiffs claim that "in order to qualify for the pro se exception, you have to satisfy twin criteria: (1) You must be interested in the transaction; and (2) You cannot charge a fee." Brief in Opposition to Application for Leave to Appeal, page 12.

That test and those cases, however, have nothing to do with the pro se exception contained in the unauthorized practice statute. While the *Walter Neller* test determines whether a corporation has practiced law at all, the statutory pro se exception assumes that the corporation has, in fact, practiced law, but permits a corporation to practice law for itself. The pro se exception applies if the corporation preparing the legal document (1) is an actual party to the transaction and (2) prepares the documents on its own behalf.

If the Court considers AmeriBank's conduct to constitute the practice of law, then all of the criteria for the pro se exception are satisfied in this case. First, the bank obviously is a party to the mortgage loan. Second, as noted above, a lender that makes first mortgage loans incurs a variety of expenses, all aimed at protecting the lender's interest. Nobody would argue that these expense items (e.g., credit report, appraisal, lender's title insurance) are prepared for the borrower, even though the lender passes on to the borrower its expenses for these items. The charging of a document preparation fee in this case likewise does not transform the relationship into an attorney-client relationship between the bank and its customer. The loan documents are plainly for the benefit of the bank. To the extent that completing those documents constitutes the practice of law, the bank is practicing law for itself. Therefore, it qualifies for the pro se exception to MCL § 450.681.

Contrary to Plaintiffs' claim, there is not any Michigan Supreme Court authority "which recognizes and defines the 'pro se' exception." Brief in Opposition to Application for Leave to Appeal, page 11. The *Walter Neller* test applies where the entity preparing the documents is i*nterested in, but not a party to*, the transaction. The pro se exception applies where the entity preparing the documents is practicing law, and it makes that conduct lawful if the entity is acting for itself and is a party to the transaction. The Michigan Supreme Court has never analyzed or defined the pro se exception, and it should do so under the criteria set forth in the statute and not criteria applicable to entirely different circumstances. The Court of Appeals erred when it applied the wrong criteria in determining whether the pro se exception applied in this case.

IV. THE HOLDING OF THE COURT OF APPEALS DOES NOT PROTECT BORROWERS.

The "paramount rule of statutory interpretation is that we are to effect the intent of the Legislature." *Wickens v Oakwood Health System*, 465 Mich 53, 60; 631 NW2d 286 (2001). "In construing the meaning of a statute the courts must consider the history of the subject matter involved, the end to be attained, the mischief to be remedied and the purpose to be accomplished." 2A Sutherland on Statutory Construction, Section 45:05, p. 31 (Sixth Edition, 2000).

As the Court of Appeals acknowledged, the purpose of the unauthorized practice statute is "to protect the public from untrained legal counsel and incorrect legal advice." *Dressel*, 247 Mich App 133, 138; 635 NW2d 328, 330 (2001). This is the "mischief" that the statute was enacted to prevent. The decision of the Court of Appeals does nothing to further that purpose or prevent that mischief.

Under the Court of Appeals' approach, AmeriBank could have avoided liability to the Plaintiffs by hiring a lawyer to fill in the blanks in the preprinted forms. But that lawyer would have been *AmeriBank's* lawyer and *not* the Plaintiffs' lawyer. That lawyer's job would have been to protect *AmeriBank's*, and not the Plaintiffs', interests. On top of that, AmeriBank would have had to charge Plaintiffs a much larger "document preparation fee" in order to cover AmeriBank's legal fees. Thus, the Court of Appeals' decision

not only does not *protect* borrowers, it is contrary to the interests of borrowers by increasing the costs of obtaining residential mortgage loans.

If the Court of Appeals' decision stands, then a lender like AmeriBank or another member of the Michigan Bankers Association has two options. It can either (1) continue to have lay employees fill out loan documents and disguise the cost recovery in a loan processing fee or a higher interest rate or (2) hire an attorney or attorneys to fill in the blanks and charge each borrower a larger document preparation fee to pay for the attorneys.

Where a lender chooses not to charge a document preparation fee, the Court of Appeals' reading of the unauthorized practice of law statute has the following results:

- The lender will continue to fill in the blanks on standard loan documents that the secondary market requires the lender to use – completing those documents precisely as they have done in the past.
- The borrower will not have any additional protection from "untrained legal counsel and incorrect legal advice," because the lender will not provide any legal counsel or legal advice to the borrower. The completion of the loan documents will be solely for the benefit of the lender.
- The lender will pass on its cost of preparing the loan documents to the borrower either in the form of an increase in the applicable interest rate or as a loan processing fee. Therefore, the borrower will not experience any financial savings as a result of the Court of Appeals' decision.

Where a lender chooses to charge a document preparation fee, the Court of Appeals' reading of the unauthorized practice of law statute has the following results:

- The lender will have to hire attorneys to fill in the blanks on standard loan documents that the secondary market requires the lender to use.
- Borrowers will not obtain any benefit from the lender's hiring and use of attorneys to fill in the forms because the blanks in the standardized forms will be completed in exactly the same manner as they would have been if non-lawyers had filled in the blanks.
- The purpose of the unauthorized practice statute will not be furthered because the attorney's client will be the lender, and not the borrower. The borrower will not have any additional protection from "untrained legal counsel and incorrect legal advice," because no legal counsel or legal advice will be offered to the borrower. If the borrower wishes to have the benefit of trained legal counsel and correct legal advice, then it will need to hire its own lawyer.[1]
- Lenders will have to increase the amounts of their document preparation fees to recover the costs of the attorneys that the Court of Appeals made them hire and use to complete the blanks in the standard documents that they are required to use. This will increase the cost to borrowers of obtaining residential mortgage loans in Michigan.

Under either of these scenarios, the loan documents will be completed in exactly the same manner as they were being completed before the Court of Appeals' decision. In each case, the borrower will have to pay for the time spent preparing the legal forms (whether that expense is itemized or not, and whether that time is spent by an attorney or a bank employee). Neither scenario will protect the borrower from

"untrained legal counsel" or "incorrect legal advice." And if the borrower wants legal advice, it will have to hire its own lawyer.

The Court of Appeals' interpretation of the statute does nothing to promote the protection of consumers. To the contrary, it could harm Michigan consumers by increasing the costs of obtaining residential mortgage loans. This Court should not permit that decision to stand.

V. AMERIBANK IS EXEMPT FROM THE MICHIGAN CONSUMER PROTECTION ACT.

The Michigan Bankers Association agrees with AmeriBank that it is exempt from the Michigan Consumer Protection Act. It is important for the Court to understand that this exemption applies (1) both before and after AmeriBank converted from a federal savings bank to a state savings bank and (2) regardless of the fact that the loans in question are "deregulated" loans subject to the Depositary Institutions Deregulation and Monetary Control Act ("DIDMCA").

The exemption under Section 4(1) of the Consumer Protection Act applies to conduct that is "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." MCL § 445.904(1). As AmeriBank noted in its Application for Leave to Appeal, this exception applied when the bank was a federal savings bank regulated by the Office of Thrift Supervision, and it continued to apply when the bank was converted to a Michigan savings bank regulated by the Financial Institutions Bureau (now the Office of Financial and Insurance Services). In fact, the Court of Appeals recognized that AmeriBank was authorized to make loans and was regulated "by the Financial Institutions Bureau of this state as well as federal authorities." *Dressel*, 247 Mich App 133, 146; 635 NW2d 328, 334-335 (2001).

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[1] This only emphasizes the bank's qualification for the pro se exception. If, when an attorney fills in the blanks of preprinted loan forms, its client is the bank, then it follows that when the bank fills out the same forms, its client is itself. That is the pro se exception.

AmeriBank also noted in its Application for Leave that the loans at issue in this litigation all are deregulated loans under DIDMCA and are therefore exempt from the Credit Reform Act. Plaintiff argued in its Brief in Opposition that the fact that the loans are "deregulated" DIDMCA loans means that they do not qualify for the exemption under Section 4(1). Brief in Opposition to Application for Leave to Appeal, page 19. In fact, DIDMCA loans are deregulated only in the sense that they are not bound by state interest rate limitations. 12 USC § 1735f-7a. This does not mean that they are not regulated at all or that they are not "specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States" as required by Section 4(1).

VI. THE COURT OF APPEALS' DECISION WOULD PERMIT PLAINTIFFS AND THEIR ATTORNEYS TO RECEIVE A WINDFALL.

Plaintiffs and the other members of the class that they represent seek to recover "document preparation fees" that they paid to AmeriBank in connection with residential mortgage loans that they obtained from AmeriBank. This recovery would be a windfall to Plaintiffs and their attorneys.

Plaintiffs seek a refund of the document preparation fees because AmeriBank did not hire an attorney to fill in the blanks in the pre-printed standard mortgage loan documents. But Plaintiffs do not claim – and they have no basis for claiming – that they were damaged in any way by the fact that AmeriBank did not hire an attorney to complete the blanks in the form documents. To the contrary, as pointed out above, if AmeriBank had done what Plaintiffs say it should have done – i.e. hire an attorney to prepare the forms – then Plaintiffs would not have received any benefit, because the attorney's job would have been to protect AmeriBank's interests and not Plaintiffs'. Moreover, Plaintiffs would have had to pay more for their loans, in order to reimburse AmeriBank for the attorney's fees.

Thus, Plaintiffs and their class members have not been damaged by the acts of AmeriBank about which they complain. To the contrary, they have benefited from those acts by obtaining their loans at a

lower cost. Under these circumstances, if this Court were to agree with the Court of Appeals that AmeriBank should have hired an attorney to fill out the forms, it would be completely inequitable to permit Plaintiffs and their class members and attorneys to obtain refunds of the document preparation fees they paid. Requiring such refunds would be equivalent to imposing punitive damages on AmeriBank when it has not done anything that would justify punitive damages.

If this Court were to conclude that AmeriBank engaged in the unauthorized practice of law, then this Court should not order refunds but instead should leave enforcement to the State Bar of Michigan, which routinely enforces the unauthorized practice of law statutes by obtaining and enforcing injunctions, consent decrees and similar relief.

CONCLUSION

For the reasons set forth in AmeriBank's Brief on Appeal and in this brief, the Michigan Bankers Association supports AmeriBank's appeal and respectfully requests that this Court reverse the decision and order of the Court of Appeals dated August 3, 2001, and reinstate of the judgment of the Circuit Court for the County of Kent dated July 12, 1999, dismissing the action.

Respectfully submitted,

MICHIGAN BANKERS ASSOCIATION

Date: June 18, 2002

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